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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications Markets	)	
	)	
	)	

REPLY COMMENTS OF THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS OF THE CITY OF NEW YORK ON THE NOTICE OF INQUIRY ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND FRANCHISE FEES

Michael D. Hess, Esq.
Bruce Regal, Esq.
Office of the Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007
(212) 788-1327

Elaine Reiss, Esq.
General Counsel
Department of Information Technology and Telecommunications
of the City of New York
11 MetroTech Center
Brooklyn, New York 11201
(718) 403-8501

Counsel for the Department of Information Technology and Telecommunications
of the City of New York

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INTRODUCTION

The Department of Information Technology and Telecommunications of the City of New York ("the City") submits these reply comments in response to the Federal Communications Commission's (the "Commission") Notice of Inquiry with respect to Section 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253.[1]

The City has franchised telecommunications providers since 1990 and actively embraces telecommunications competition. Currently, the City has ten franchised telecommunications providers.

Section 253 was enacted to ensure that state and local governments do not become entry barriers to companies seeking to provide telecommunications service. As evident from the robust telecommunications competition in the City, the reasonable franchise terms and conditions the City seeks from telecommunications providers fall squarely within the City's rights-of-way management authority and are not barriers to entry. As numerous commentors noted in their initial comments, local government regulation and compensation requirements have not and are not inhibiting competition in telecommunications services.[2] Thus, the Commission should not alter the carefully

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[1] See In re Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Dkt. No. 99-217, CC Dkt. No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Dkt. No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Dkt. No. 96-98 (rel. July 7, 1999).

[2] See, e.g. the comments filed in this proceeding by the National Association of Telecommunications Officers and Advisors, et al. ("NATOA") at 5-6; the National League of Cities, et al. at 13-17; the City of Philadelphia at 3; the City of Chicago at 6-7; the City of White Plains at 1; and the Colorado Municipal League, et al. at 10-11. In these reply comments, the City has cited a particular party's comments by identifying the name of the party and the page numbers we are citing to.

crafted balance that Congress provided in Section 253 that respects local government jurisdiction and did not give the FCC carte blanche to regulate this local exercise of authority.

I. The Commission Has No Authority to Impose a National Framework for Implementing Section 253

The Commission has no authority to impose a national framework for implementing Section 253 on state and local governments. It is clear on the face of the statute that Congress did not intend to eliminate the historical authority that state and local governments have enjoyed. A national framework for implementing Section 253 would preempt many regulations that are contemplated by Section 253(b) and (c),[3] and would exceed the Commission's authority.

A. The Commission's Authority is Not Broad Enough to Allow a National Framework to Preempt State and Local Regulations Under Section 253

There is no statutory basis for the Commission prospectively to preempt local regulations. Congress specifically provided the Commission with a limited power to preempt local government actions that are inconsistent with Sections 253(a) and (b). Section 253(d) explicitly contemplates case-by-case adjudication by the Commission when a complaint alleges that a state or local government action violates Section 253(a) and (b).[4] It is inconsistent with the Act for the Commission to promulgate a one-size-fits-all rule for implementing Sections 253(a) and (b). Rather, Section 253(d) authorizes

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[3] Several commentors suggest that the Commission should implement a national framework that would preempt state and local authority in order to implement Section 253. See, e.g. RCN Telecom Services, Inc. ("RCN") at 8, 13-18; AT&T Corp. at 17-18; Global Crossing Ltd. at 8-10.

[4] " Preemption. – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that

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preemption on a case-by-case basis if a Section 253(a) or (b) violation is demonstrated by a complainant. Bootstrapping a specific congressional authorization to resolve individual "entry barrier" complaints into a general authority to create national rulemakings and broad preemption would clearly subvert the structure established by Congress.

The argument propounded by RCN, AT&T and Global Crossing that the Commission has a general preemption power over local governments' rights-of-way management authority is contrary to the plain language of the Section 253. If Congress intended the Commission to have the power to preempt local government regulation under Section 253(c), it would have included Section 253(c) in Section 253(d)'s explicit grant of preemption authority.

Further, the Commission has no implicit preemption authority based on the structure of Section 253. "Absent explicit preemptive language, Congress' intent to supercede state law altogether may be found from a 'scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it.'"[5] The substantial reservation of authority for local governments in Section 253(c) precludes a finding of implicit preemption. Federal regulation of telecommunications is not "so pervasive" that there is no room for state and local governments to promulgate regulations that are not otherwise inconsistent with the Act. In fact, as Section 253 itself makes clear, Congress intended for state and local authorities to retain their power to

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violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d).

[5] Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Development Comm'n., 461 U.S. 190, 203-204 (1983) ("Pacific Gas").

regulate under the Act.[6] In regulatory systems with shared authority, preemption of state and local regulations is not warranted where "Congress has left sufficient authority in the states to allow [state regulation to alter federal policy] . . . [I]t is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective."[7] The Commission should not disturb Congress' carefully calibrated division of regulatory authority.

B. A National Framework Violates Constitutional Limits on Federal Power over Local Governments

The Commission cannot require local governments to promulgate policies. The imposition of a national franchising framework violates the Tenth Amendment's structural separation requirements – "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[8] Indeed, the First Circuit recently noted that if Section 253(c) were interpreted to impose "affirmative obligations" on local governments (as complying with a national franchising framework would both for those local governments that have decided not to exercise their authority to adopt policies regarding the use of PROW, and those local governments that have implemented regulations), it would raise serious constitutional issues regarding the ability of Congress to "commandeer local regulatory bodies for federal purposes."[9]

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[6] Congress specifically reserved the authority of state and local governments in other parts of the Act as well. See, e.g. 47 U.S.C. § 332(c)(7) (preserving the local zoning authority of state and local governments over the "placement, construction, and modification of personal wireless service facilities.").

[7] Pacific Gas, 461 U.S. at 222-223.

[8] New York v. United States, 505 U.S. 144, 188 (1992). Since local governments are political subdivisions of the states, this principle of federalism is applicable to local governments as well.

[9] Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston, 184 F.3d 88, 105 (1st Cir. 1999) (citing Printz v. United States, 521 U.S. 898, 934 (1997)).

C. The "Problems" RCN Cites in Support of its Position are Illusory

RCN cites to a number of "problems" that it contends supports the need for a national franchising framework. RCN's arguments are misplaced and inconsistent both with the language of the Act and cases that have interpreted Section 253. RCN argues that a national framework for implementing Section 253 is needed in part because of delayed action or inaction by local governments in responding to requests for access to PROW. RCN argues that any national framework should mandate time periods for local government action, and suggests that local governments be required to act within 30 days of receipt of an access request.[10] There is no statutory support for such a requirement in Section 253. Unlike the wireless facilities (tower) code provisions in Section 332(c)(7) of the Act, 47 U.S.C. § 332(1)(7), Section 253 does not mandate that local governments act on an expedited basis. This distinction shows that Congress knows how to articulate a schedule for government action when deemed appropriate. The failure to include such a time constraint in Section 253 is significant. A Commission imposed 30 day time period for local government action on PROW access applications not only is unlawful, but would be impracticable as well. The time taken by a local government to authorize the use of its PROW becomes relevant only if the inaction or delay rises to a prohibition, or an effective prohibition, in violation of Section 253(a).

RCN, Global Crossing, Sprint, ALTS and AT&T also maintain that any fees associated with use of public rights-of-way should be limited to costs incurred by the

[10] RCN at 10.

local governments.[11] The plain language of Section 253(c) refutes this argument. As the City explained in its initial comments in this proceeding, Section 253(c) is silent as to costs, and speaks only to "compensation." Section 253(c) limits a local government's imposition of fees only to ensure that the fees must be fair, reasonable and imposed on a nondiscriminatory basis.[12] Compensation for "use" includes reimbursement for actual costs to the City but does not limit local governments to recovery of their expenses. Several courts have held that compensation is broader than "costs" and may include "rent."[13] This reading is consistent with the Act's language, and is the only lawful reading of the term "compensation." PROW are held as a public trust, and the public is allowed to benefit for the private use of public property by receiving lawful payments.[14]

Finally, RCN contends that access to the PROW must be on an "equitable" basis.[15] "Equitable" is not the statutory test. The statute requires that management of the PROW be "competitively neutral" and "nondiscriminatory."[16] The Commission has interpreted Section 253(c) to mean that "similarly situated" entities should be treated in a

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[11] RCN at 9; Global Crossing Ltd. at 13; Sprint Corporation at 9-10; Association for Local Telecommunications Services ("ALTS") at 17; AT&T Corp. at 20.

[12] Department of Information Technology and Telecommunications of the City of New York at 4-9.

[13] See TCG Dearborn v. City of Dearborn, 16 F. Supp.2d 785, 789 (E.D. Mich. 1998); Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey, 1999 WL 494120, *6 (S.D.N.Y. July 13, 1999).

[14] The analogy RCN makes to TELRIC and collocation cost allocation is not valid, because those schemes are rooted in different policies with different issues that go directly to the relationship between the ILEC and its competitors. These pricing mechanisms are simply not relevant to a determination of what "compensation" is reasonable for a local government to charge for use of its PROW.

[15] RCN at 5.

[16] 47 U.S.C. 253(c) reads: "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

similar manner, not that all telecommunications providers must be treated identically.[17] This interpretation recognizes the differences in service, technology, and burdens on the PROW among different types of providers.

RCN and Global Crossing also argue that a national framework is required because the variations in local government regulation and application procedures make it difficult for providers to enter new markets and provide competition.[18] This rationale ignores Congress' intent and the realities of local governance. Congress enacted the safe harbor of Section 253(c) in order to preserve the authority of local governments over their PROW.[19] Implicit in this reservation of local authority was an acknowledgement that practices vary jurisdiction-by-jurisdiction. Section 253 was enacted in order to strike a balance between the market opening initiatives required to increase competition in telecommunications and the need for local governments to retain their historical authority to protect and receive compensation for the use of their PROW.[20] For the Commission to preempt all local regulation with a national franchising framework would ignore the latter half of this equation and directly violate Congress' will.

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[17] In re Classic Telephone, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 13,082, ¶ 37 (1996).

[18] RCN at 6-7; Global Crossing Ltd. at 7-8.

[19] "I am pleased that Section 253(c) recognizes the historic authority of State and local governments to regulate and require compensation for the use of the public rights of way." 142 Cong. Rec. H1174 (daily ed. Feb. 1, 1996) (statement of Rep. Pelosi).

[20] See, 142 Cong. Rec. H1174 (daily ed. Feb.1, 1996) (statement of Rep. Pelosi); 142 Cong. Rec. H1176 (Feb.1, 1996) (statement of Rep. Borski).

II. Cable Operators with Existing Franchises Are Subject to Regulation by Local Governments Under Section 253

The National Cable Television Association, Cox Communications, MediaOne and AT&T ("cable operators") argue that Section 253 does not allow local governments to regulate cable operators who use their existing facilities to provide telecommunications services.[21] These commentors argue that the Commission should adopt a narrow reading of local government authority under Section 253(c) that prohibits the regulation of franchised cable operators providing telecommunications services over existing systems.

Regulating cable franchisees that provide telecommunications service as telecommunications providers is permitted under Section 253. Local governments have the authority to regulate all telecommunications providers under Section 253. Title VI of the Cable Act prohibits local governments from regulating telecommunications services provided by cable operators under a cable franchise.[22] Therefore, if a cable system is used to provide telecommunications services, the City cannot regulate this use of its property under Title VI. However, Section 253(c) contains no restriction on the regulation of telecommunications providers that use existing cable systems, and authorizes local governments to exercise management authority over telecommunications providers using their PROW and to charge for the use of the PROW. The cable operators' argument – that local governments are limited in their ability to regulate

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[21] National Cable Television Association ("NCTA"), passim; Cox Communications, Inc., passim; MediaOne Group, Inc. at 10-11; AT&T Corp. at 16-17.

[22] 47 USC § 541(b)(3)(B). See also In re TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order, 12 FCC Rcd. 21,396, ¶ 69-70 (1997).

telecommunications providers using existing cable systems – is wrong and the Commission should reject it.

In addition, the cable operators argue that Section 253(c) limits a local government to recovery of costs for use of its PROW.[23] The cable operators argue that local governments may not require additional fees for use of an existing cable system to provide telecommunications services as there will be no new "costs" to the local governments for use of the PROW. This argument is baseless. As discussed above, local governments are not limited to cost recovery under Section 253(c), and may obtain "compensation" for the use of their PROW. The City reiterates that the Commission should put to rest these arguments that local governments have limited authority under Section 253(c). The correct interpretation of local government authority under Section 253(c) is set forth in detail in the City's initial comments.

CONCLUSION

The City respectfully requests that the Commission reject the arguments refuted herein and adopt the interpretations of Section 253 of the Act set forth in the City's initial comments and these reply comments.

[23] NCTA, passim; Cox Communications, Inc., passim; MediaOne Group, Inc. at 10-11; AT&T Corp. at 16-17.

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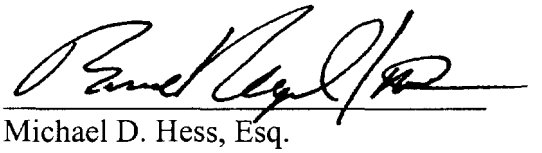

Michael D. Hess, Esq.
Bruce Regal, Esq.
Office of the Corporation Counsel of the
City of New York
100 Church Street
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Elaine Reiss, Esq.
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